Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

AZZAM AHMED,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Ohio Court of Appeals for the Eighth Judicial District

PETITION FOR WRIT OF CERTIORARI

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January 28, 2008

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QUESTIONS PRESENTED

Whether the elimination by judicial decision of presumptions in favor of minimum sentences and against maximum or consecutive sentences as applied to a defendant convicted of crimes which allegedly occurred prior to the judicial decision, resulting in imposition of maximum, and consecutive sentences, violates the proscription against *ex post facto* laws and the Due Process Clause of the Fourteenth Amendment.

Whether the failure of appellate counsel to raise clear constitutional errors on appeal, which would have resulted in the reversal and vacation of defendant's maximum, consecutive sentences, violates the defendant's Sixth Amendment right to the effective assistance of counsel.

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Petitioner Azzam Ahmed respectfully prays that a Writ of Certioriari issue to review the decision of the Ohio Court of Appeals for the Eighth Judicial District entered on June 11, 2007.

OPINIONS BELOW

The Ohio Court of Appeals for the Eighth Judicial District announced its decision in this case on May 31, 2007, and issued an unpublished opinion on June 11, 2007. A copy of that opinion is attached as Appendix B. The Ohio Supreme Court issued a one-page order denying discretionary review of the Court of Appeals' decision on October 31, 2007. A copy of that order is attached as Appendix A.

JURISDICTION

The Ohio Supreme Court denied discretionary review on October 31, 2007. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . and to have the assistance of counsel for his defense."

Article I, Section 10 of the United States Constitution provides in relevant part: "No bill of attainder or ex post facto Law shall be passed."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

B. State Statutory Provisions:

Ohio Revised Code Section 2929.14(A) provides in relevant part:

> "(A) . . . if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:
>
> "(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.
>
> "(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years."

Ohio Revised Code Section 2929.14(B) provides in relevant part:

> "(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (G), or (L) of this section, in section 2907.02 or 2907.05 of the Revised Code, or in Chapter 2925. of the

Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

"(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

"(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

Ohio Revised Code Section 2929.14(C) provides in relevant part:

"(C) Except as provided in division (G) or (L) of this section or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section."

Ohio Revised Code Section 2929.14(C)(4) provides in relevant part:

> "(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> "(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> "(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> "(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

C. Other pertinent statutes

Relevant Ohio sentencing statutes, which are attached as Appendix C, include the following:

Ohio R.C. §2907.02 - Rape
Ohio R.C. §2907.03 - Sexual Battery
Ohio R.C. §2907.06 - Sexual Imposition

STATEMENT OF THE CASE

On August 29, 2002, the defendant, Dr. Azzam Ahmed, a 55-year gynecologist, was charged with sexual misconduct with a patient. The arrest was televised and accorded great local publicity, and the Parma, Ohio, Police Department provided a telephone number to call for other patients who believed they might have been similarly treated. The result was a secret indictment issued on May 20, 2003, charging Dr. Ahmed with fifty-three offenses involving thirty-seven patients: twenty-seven counts of sexual imposition, a third-degree misdemeanor, twenty-four counts of sexual battery, a third-degree felony, and two counts of rape, a first-degree felony.

The case proceeded to trial in January of 2004. The prosecution dismissed three counts of sexual imposition during trial. The jury ultimately acquitted Dr. Ahmed of thirty of the remaining fifty counts, rendering not guilty verdicts on thirteen of the twenty-four counts of sexual imposition, and seventeen of the twenty-four counts of sexual battery. It convicted him of eleven sexual imposition counts, seven sexual battery counts, and of the two rape counts, which involved a single patient, based on a theory that her

capacity was diminished. That patient testified for the prosecution in its case-in-chief, but returned to the stand as a witness for the defense, and recanted her testimony.

At the time of the trial, and at the time Dr. Ahmed allegedly committed the crimes, Ohio employed a "presumptive" sentencing scheme: rather than giving a judge unfettered discretion to impose a sentence within the statutory range, the statutes required a trial court to make certain findings before giving a defendant a non-minimum, or a maximum or consecutive sentence. A first offender such as Dr. Ahmed was presumptively entitled to a minimum, concurrent sentence of three years. Instead, the trial court imposed maximum sentences on each of the offenses (two of the sexual battery convictions merged with the two rape convictions), and ordered the sentences to be served consecutively, for a total sentence of forty-five years.

Upon appeal, the court of appeals affirmed the convictions, but vacated the sentences, holding that the findings made by the trial judge were not sufficient to overcome the presumption against maximum or consecutive sentences, and remanded the matter for resentencing. It should be noted that this was not a case of the appellate court determining that the trial judge had failed to make any findings; rather, the appellate court determined that the findings the trial judge *did* make were legally insufficient to support maximum or consecutive sentences.

Prior to Dr. Ahmed's resentencing, the Ohio Supreme Court issued its decision in ***State v. Foster***,

109 O.St.3d 1 (2006). The court held there that the judicial findings required by the statutes in order to impose more than minimum, maximum, or consecutive sentences constituted judicial fact-finding in derogation of a defendant's Sixth Amendment right to a jury trial, as explained in this Court's ruling in ***Blakely v. Washington***, 542 U.S. 296 (2004). As a remedy, the court severed the portions of the statute requiring those judicial findings.

The result was that a judge no longer had to make *any* findings in order to impose more than minimum, maximum, or consecutive sentences. At Dr. Ahmed's resentencing, that is precisely what occurred: the trial judge again imposed maximum, consecutive sentences.

Appeal was once more taken to the court of appeals, which affirmed the sentences in an unpublished opinion announced on May 31, 2007, and journalized on June 11, 2007. Dr. Ahmed then retained new appellate counsel, who filed an appeal to the Ohio Supreme Court, alleging, *inter alia*, that the application of ***Foster*** to crimes allegedly committed prior to the decision constituted a violation of defendant's due process rights against *ex post facto* judicial rulings, and that the failure of prior appellate counsel to raise that issue in the court below constituted ineffective assistance. The Ohio Supreme Court denied discretionary review. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING WRIT

I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER THE RETROACTIVE APPLICATION BY JUDICIAL DECISION OF THE ELIMINATION OF PRESUMPTIONS IN FAVOR OF MINIMUM SENTENCES, AND AGAINST MAXIMUM OR CONSECUTIVE SENTENCES, TO A DEFENDANT CONVICTED OF OFFENSES ALLEGEDLY COMMITTED PRIOR TO THE DECISION, VIOLATES A DEFENDANT'S DUE PROCESS RIGHTS AGAINST EX POST FACTO JUDICIAL DECISION-MAKING.

It is difficult to understate the effect of this Court's decision in ***Blakely v. Washington***, 542 U.S. 296 (2004) upon state sentencing laws. Many, such as Ohio's, provided for "presumptive" sentences, under which a defendant faced either an exact sentence or a sentence within a specific range, and the sentencing court was required to impose that sentence unless it found certain facts sufficient to override the presumption for the specified sentence. This Court's subsequent decisions, such as ***Cunningham v. California***, 127 S.Ct. 856 (2007) make clear what the Ohio Supreme Court acknowledged about Ohio's sentencing scheme in ***State v. Foster***, 109 O.St.3d 1 (2006): that a system of presumptive sentencing which depended upon judicial fact-finding to override those presumptions could not survive ***Blakely***.

Certiorari should be granted by this Court to resolve the question precisely raised by this case: whether the *ex post facto* application of ***Foster's***

remedy – essentially, abolishing those presumptions and allowing a trial court unfettered discretion in imposing more than minimum, maximum, and consecutive sentences – violates the rights of a defendant convicted of crimes which allegedly occurred prior to ***Foster***. While the immediate focus of the Court's review would be on Ohio's sentencing laws, as noted, a decision would provide clarity to other states which employed the same type of presumptive sentencing scheme.

At the outset, it is important to understand the Ohio system in effect at the time Dr. Ahmed allegedly committed his crimes in 2001 and 2002. At that time, as now, the statutory penalty for first-degree felonies such as rape was a sentence of from three to ten years, in yearly increments. The statutory penalty for third-degree felonies such as sexual battery was a sentence of one to five years, again in yearly increments.

A trial judge, however, was not free to impose a penalty anywhere within that range. If the defendant had never served a prison term before (Dr. Ahmed had never been charged, let alone convicted, of a crime before this), the judge had to make certain findings in order to impose more than the minimum sentence: that a minimum sentence "would demean the seriousness of the crime" or "would not adequately protect the public." Similarly, the judge also had to make certain findings in order to impose a maximum sentence: that the defendant had "committed the worst form[] of the offense" and that the defendant "pose[d] the greatest likelihood of committing future crimes." Moreover, before imposing consecutive sentences, the trial judge had to make additional

findings, such as that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct" and that "[a]t least two of the multiple offenses were committed as part of one or more courses of conduct."

In ***Blakely***, this Court established that

> "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." 542 U.S. at 303-304. (Emphasis in original).

Under ***Blakely***, then, at the time he allegedly committed his crimes, the maximum penalty Dr. Ahmed faced – the maximum penalty which could be imposed upon him without the trial court making any additional findings – was a minimum, concurrent sentence of three years. Any sentence beyond the minimum, let alone maximum or consecutive sentences, required judicial fact-finding that was barred by ***Blakely***.

The Ohio Supreme Court recognized this in ***Foster***, and as a remedy simply excised the portions of the sentencing statutes which required fact-finding, resulting in the elimination of the presumptions in favor of minimum sentences and against maximum and consecutive sentences. Thus, at the time Dr.

Ahmed was resentenced in 2006, he no longer could claim the benefit of the presumptions which had been in effect at the time he allegedly committed the crimes for which he was convicted.

Dr. Ahmed contends that the retroactive application of ***Foster*** to him, in the elimination of sentencing presumptions to which he was otherwise entitled, constitutes a violation of his rights to due process.

The underlying principle against retroactive application of the criminal laws is contained in Article I, Section 10 of the Constitution: "No. . . ex post facto Law shall be passed." In ***Calder v. Bull***, 3 U.S. (Dall.) 386, 390 (1798), this Court defined the four types of laws which would run afoul of that prohibition. The one pertinent to this case is the third:

> "Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."

As a result of the Ohio Supreme Court's decision in ***Foster***, and its elimination of the presumptive sentences to which Dr. Ahmed was entitled, he was subjected to substantially greater punishment than at the time he allegedly committed his crimes.

Dr. Ahmed's situation in this respect is similar to that of the defendant in this Court's decision in ***Miller v. Florida*** 482 U.S. 423 (1987). The State of Florida had enacted a comprehensive sentencing scheme which specified range of presumptive sentences for each offense. At the time the defendant committed his

crime of sexual battery, the statutes provided a presumptive sentence of 3½ to 4½ years. By the time he was convicted and sentenced, however, the presumptive sentence had been increased to 5½ to 7½ years. The Florida Supreme Court upheld the trial court's imposition of the new sentence, holding that there was no *ex post facto* violation because "the presumptive sentence established by the guidelines does not change the statutory limits of the sentence imposed for a particular offense." ***State v. Jackson***, 478 So. 2d 1054, 1056 (Fla. 1985).

On appeal to the U.S. Supreme Court, this Court first determined that

> "to fall within the ex post facto prohibition, two critical elements must be present: first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" 482 U.S. at 430.

The Court unanimously concluded that defendant met both those criteria. The change in the law had obviously been applied retroactively, and there was no difficulty in concluding that the change in the sentencing scheme "disadvantaged" the defendant: it increased his presumptive sentence by two to three years.

The same argument applies here: Dr. Ahmed was entitled to a presumptive sentence of minimum, concurrent terms, and the ***Foster*** decision's elimination of that entitlement operated retrospectively to his disadvantage.

The Florida change resulted from legislative action, while ***Foster*** was of course a judicial decision. The Ohio Supreme Court's ruling in ***Foster*** does not directly implicate the *Ex Post Facto* Clause, since that provision is a only a limitation upon the powers of the legislature, not the judicial branch. ***Marks v. United States***, 430 U.S. 188, 191 (1977).

This Court has held, however, that the retroactive application of a judicial decision may be similarly prohibited because of due process considerations. In striking down the retroactive application of an interpretation of a criminal statute by the state's highest court, this Court ruled in ***Bouie v. Columbia***, 378 U.S. 347 (1964),

> "The Due Process Clause compels the same result. . . where the State has sought to achieve precisely the same effect by judicial construction of the statute. While such a construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal." 378 U.S. at 362.

The protections afforded by due process considerations against the retroactive application of judicial decisions are not necessarily co-extensive with the protections of the *Ex Post Facto* Clause against the retroactive application of criminal statutes. The distinction in those protections was defined by this Court in ***Rogers v. Tennessee***, 532 U.S. at 451, 462 (2001), in which this Court stated,

> "a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" (Quoting ***Bouie***, 378 U.S. at 354).

Thus, the proper focus is on the warning and notice a defendant has in the possibility of a judicial decision retroactively enhancing the criminality of his conduct or the penalty to be imposed for it. ***United States v. Lanier***, 520 U.S. 259, 266 (1997) ("Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.")

Had Dr. Ahmed's alleged crimes been committed after ***Blakely*** was decided, a legitimate argument might be advanced that ***Blakely*** gave just such notice. The 6th Circuit concluded as much with regard to an argument on the retroactive application of ***Booker v. United States***, 543 U.S. 220 (2005):

> "While it is true that precisely what effect Blakely would have on the Guidelines was not known, *Blakely* was decided before defendant committed the robberies here. Thus, it would not have been a leap of logic to expect the Supreme Court to apply *Blakely* to the Guidelines in some manner." ***United States v. Barton***, 455 F.3d 649, 653-654 (6th Cir. 2006).

There can be no such argument here, however; Dr. Ahmed's alleged crimes occurred several years before ***Blakely*** was decided, and while this Court's earlier decisions in ***Apprendi*** and ***Ring*** served as the groundwork for ***Blakely***, it would be difficult to argue that more than a few legal scholars anticipated the ***Blakely*** decision, let alone that the average individual had "fair warning" of it.

Moreover, the change wrought by ***Foster*** specifically impacted Dr. Ahmed. As noted, his original sentence was vacated not because the judge failed to make any findings justifying a maximum, consecutive sentences, but because the findings the trial judge *did* make didn't warrant maximum, consecutive sentences. Had it not been for the ***Foster*** decision, it is quite possible that the trial judge would have been bound to give Dr. Ahmed no worse than non-maximum, concurrent sentences. Because of ***Foster***, the trial court gained unfettered discretion to sentence Dr. Ahmed to maximum, consecutive sentences of 45 years.[1]

In summary, due process mandates that a judicial decision nullifying the presumptive sentences contained in Ohio's statutes cannot be retroactively applied to Dr. Ahmed so as to deny him of the benefit of those statutes. The Ohio Supreme Court's retroactive elimination of the presumptive sentencing

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[1] Ohio law does not provide for parole or any other method of early release for someone sentenced to more than ten years in prison. Dr. Ahmed's scheduled release date from prison is February of 2049, when he will be 102 years old.

in ***Foster*** disadvantaged Dr. Ahmed in the same fashion that the South Carolina Supreme Court's retroactive expansion of the criminal trespass statute disadvantaged the defendants in that case.

II. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER APPELLATE COUNSEL IS INEFFECTIVE FOR FAILING TO RAISE SENTENCING ERRORS ON APPEAL WHEN THE FAILURE TO PROPERLY PRESERVE THE ISSUE RESULTS IN THE AFFIRMANCE OF THE MAXIMUM POSSIBLE SENTENCE.

As noted, prior appellate counsel did not raise the due process violation inherent in the retroactive application of ***Foster*** to Dr. Ahmed's case. That issue was raised for the first time by present appellate counsel, in the Memorandum in Support of Jurisdiction seeking discretionary review by the Ohio Supreme Court, which was denied. Ordinarily, the failure to raise an issue on appeal in the lower court constitutes a waiver of that issue on further appeal.

The failure to raise the issue below does not constitute a waiver, however, where prior appellate counsel was ineffective in failing to raise it.[2] The test for ineffective assistance of counsel enunciated by this Court in ***Strickland v. Washington***, 466 U.S. 668

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[2] Present appellate counsel also asserted the issue of the ineffective assistance of prior appellate counsel, in their failure to raise the due process issue, in the aforementioned Memorandum in Support of Jurisdiction seeking discretionary review by the Ohio Supreme Court.

(1984) also pertains to appellate counsel. ***Roe v. Flores-Ortega***, 528 U.S. 470 (2000).

This does not impose upon appellate counsel a duty to raise *all* non-frivolous assignments of error. ***Jones v. Barnes***, 463 U.S. 745 (1983). A defendant may be able to establish constitutionally inadequate performance, however, by demonstrating that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker. ***Mayo v. Henderson***, 13 F.3d 528, 533 (2d Cir. 1994). Essentially, the procedure for resolving that question is that outlined in ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1985):

> "When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome."

Prior appellate counsel, in their Brief to the Ohio Court of Appeals, made two sentence-related arguments. (A third assignment of error related to the application of bond money to fines and costs.) The sum of counsel's argument was that while the ***Foster*** remedy "gave Trial Courts [sic] the ability to sentence at any level, maximum sentence, consecutive sentence or both, without stating reasons," Dr. Ahmed's

resulting 45-year sentence, "violates the Eighth Amendment" and constituted "an 'exceptional sentence' based upon facts neither admitted nor found by a jury." Brief at 11.

These arguments represent a complete misreading of ***Blakely*** and its progeny. An "exceptional sentence" under ***Blakely*** is one in which the trial court employs judicial fact-finding to impose additional prison time, over and above what the jury verdict would allow. ***Foster*** permitted trial courts to impose maximum penalties without any fact-finding. Whether this is good policy might be subject to debate, but there is nothing in this Court's cases which suggest that this is constitutionally impermissible, let alone that it is an "exceptional sentence" under ***Blakely.***

Moreover, the arguments are wholly at odds with prevailing Eighth Amendment jurisprudence, which limits consideration of that issue to single sentences, as opposed to the effect of sentences for multiple offenses. ***United States v. Aiello***, 864 F.2d 257, 265 (2d Cir. 1988) ("Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence"); ***Pearson v. Ramos*** , 237 F.3d 881, 886 (7th Cir. 2001) ("every sentence * * * must be treated separately, not cumulatively, for purposes of determining whether it is cruel and unusual.")

To a large extent, this Court's resolution of the first argument raised in support of granting *certiorari* is outcome-determinative for the second argument: if this Court concludes that the retroactive application of the ***Foster*** remedy violates the due process rights of

Dr. Ahmed, then it necessarily follows that prior appellate counsel was ineffective in not asserting that argument, and instead relying on "issues that were clearly and significantly weaker." ***Gray v. Greer, supra.*** It is respectfully submitted that just such a conclusion is warranted in this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this Court should grant the Petition for Certiorari.

Respectfully Submitted,

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APPENDIX A

SUPREME COURT OF OHIO

Case No. 2007-1357

[Filed October 31, 2007]

State of Ohio	)
	)
v.	)
	)
Azzam Ahmed	)
	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Cuyahoga County Court of Appeals: No. 88315)

/s/
THOMAS J. MOYER
Chief Justice

APPENDIX B

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

Journal Entry and Opinion No. 88315

[Decided May 31, 2007]

STATE OF OHIO	)
PLAINTIFF-APPELLEE	)
	)
vs.	)
	)
AZZAM AHMED	)
DEFENDANT-APPELLANT	)
	)

JUDGMENT:
AFFIRMED; REMANDED
FOR CLARIFICATION

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-437437

BEFORE: Sweeney, P.J., Stewart, J., and Boyle, J.

RELEASED: May 31,2007

JOURNALIZED: JUN 11 2007, VOL 636 NO 949

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JAMES J. SWEENEY, P.J.:

{¶1} Defendant-appellant, Azzam Ahmed ("defendant"), appeals from his resentencing in the Cuyahoga County Court of Common Pleas. For the following reasons, we affirm and remand for clarification.

{¶2} On May 20,2003, defendant was indicted on 53 counts, including gross sexual imposition, sexual battery, and rape. The matter proceeded to a jury trial and defendant was found guilty on two counts of rape, seven counts of sexual battery and 11 counts of sexual imposition. Two of the counts of sexual battery were merged with the two counts of rape for purposes of sentencing and defendant received a maximum term

of 45 years in prison.[1] Defendant appealed to this Court and we affirmed the conviction but reversed and remanded for resentencing. See *State v. Ahmed*, Cuyahoga App. No. 84220, 205-Ohio-2999.

{¶3} At the re-sentencing hearing on May 23, 2006, the trial court did not merge the two counts of sexual battery with the two counts of rape and increased the previous sentence of 45 years to 55 years by ordering that the maximum sentences for each felony offense be served consecutively. Defendant timely appealed from his resentencing, raising three assignments of error for review.

{¶4} "I. The sentencing criterea [sic] imposed by the State of Ohio through Revised Code 2929. as interpreted in *State v. Foster* 109 Ohio St.3d 1; 2006 Ohio 856 (2006) [sic] violates the Sixth Ammendmant [sic] of the Constitution of the United States.

{¶5} "II. The trial court erred in imposing the maximum consecutive sentence allowed upon the appellant, violating the constitution [sic] of the Sate [sic] of Ohio and the United States of America."

{¶6} Since the first two assignments of error are interrelated, we shall address them together. Defendant asserts that his maximum consecutive 55-year sentence for two counts of rape, seven counts of sexual battery and 11 counts of sexual imposition is excessive and contrary to law because the trial court did not consider the factors set forth in R.C. 2929.12.

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[1] Original Sentencing Transcript at page 4748.

Specifically, defendant maintains that he should have been given community controlled sanctions, that he has always been a law-abiding citizen, that he is not likely to offend because his medical license was taken away, that he has shown remorse for the offenses, and that the 55-year term amounts to a life sentence.

{¶7} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Ohio Supreme Court found certain provisions of Ohio's sentencing statute unconstitutional, in light of *Blakely v. Washington* (2004), 542 US. 296, 124 S.Ct 2531, 159 L.Ed.2d 403, 159 L.Ed.2d 403, because said provisions required judicial fact finding to exceed the sentence allowed simply as a result of a conviction or plea. The court therein concluded "***that trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at ¶ 100.

{¶8} While courts are no longer duty-bound to make statutory findings, trial courts are still required to consider the general guidance factors contained in R.C. 2929.11 and R.C. 2929.12 in their sentencing decisions. See *State v. Duff,* Licking App. No. 06CA81, 2007-Ohio-1294; *State v. Diaz*, Lorain App. No. 05CA008795, 2006-Ohio-3282. Accordingly, while judicial fact-finding is no longer required before a court imposes consecutive or maximum prison terms, such findings can be a useful aid for an appellate court in ascertaining and understanding the trial court's rationale behind its imposition of a certain sentence.

See *State v. Green,* Cuyahoga App. No. 88096, 2007-Ohio-1291.

{¶9} Here, our review of the resentencing hearing shows that the trial court did consider the general guidance and statutory factors when imposing the maximum consecutive sentences. The trial court sentenced defendant to consecutive maximum terms based on the physical and mental injuries suffered by his victims, the position of trust the defendant held at the time of the offenses, and the fact that he used this position to facilitate the offenses, and on its finding that "there has never been a situation like this where a doctor so violated the interest and the responsibility that he's had to his client. And so, therefore, the Court is in a situation where the Court has to look out for what are the best interests of today and the impact his conduct has had on society, and not just women, on society in general. That they can be so betrayed by a person of trust." (Tr. 16-17).

{¶10} During sentencing, the court appeared to intend to impose a combined sentence of 45 years.[2] The transcript of the plea hearing indicates that the trial court found, as a matter of law, that two counts of sexual battery merged with two counts of rape for purposes of sentencing and imposed a sentence of 45 years. However, the court's sentencing entry imposed a combined sentence of 55 years. It is a fundamental principle of appellate review that the court speaks only through its journal. *Kaine v. Marion Prison Warden* (2000), 88 Ohio St.3d454, 455. Do to the significant

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[2] Original Sentencing Transcript at page 4748.

discrepancy between the court's stated intent to impose a 45-year sentence and the journal entry that reflects a 55-year sentence, we remand this case back to the trial court to clarify its intentions by reconciling the journal entry.

{¶11} Assignments of error I and II are overruled.

{¶12} "III. The trial court erred in allowing bail money, provided by the wife of the appellant to be applied to fines levied, constiuting [sic] an unlawful taking of property in violation of the Constitution of the United states [sic] and the State of Ohio."

{¶13} In his third assignment of error, defendant claims that the trial court erred in applying a $50,000 bond toward the payment of fines imposed by the trial court.

{¶14} Bail of any type deposited by an accused is subject to forfeiture proceedings pursuant to R.C. 2937.40(C). Once bail is deposited in the clerk's office by an accused, the court can lawfully apply the deposited bail toward the satisfaction of any penalty, fines, or costs assessed against the accused. R.C. 2937.40(C). The question of whether the bail was deposited by the accused or by someone other than the accused is a question of fact left to the discretion of the trial court. *State v. Howard* (June 1,1984), Clark App. No. 1909.

{¶15} Here, the record demonstrates that the trial court ordered a bond to be posted in the amount of $50,000 on May 21, 2003. However, the record does not contain the bond and there is no evidence of who

actually posted it. Defendant claims that his wife provided the bond money and that his then attorney signed a clerk's office form, which authorized the application of this money to any fines or costs, which the court might ultimately impose. However, as previously noted, neither the bond nor the clerk's office form is contained in the record.

{¶16} An appellate court's review is limited to the record presented before it. See App.R. 9 and 12(A)(1)(b). An appellant has the burden of providing a record on appeal. See App.R. 9(B) and 10(A). This duty falls upon the appellant because the appellant has the burden on appeal to establish error in the trial court. See App.R. 9(B). When the record is incomplete or unclear, an appellate court must presume the regularity of the trial court's proceedings and affirm its decision. See *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 409 (where portions of the record are omitted, which are necessary for effective review, the appellate court must affirm).

{¶17} Since the record is unclear exactly who posted the bond, we are unable to review defendant's assignment of error for lack of a complete record, and we must presume the regularity of the trial court proceedings.

{¶18} Assignment of Error III is overruled.

Judgment affirmed; cause remanded for clarification of sentencing.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, PRESIDING JUDGE

MELODY J. STEWART, J.,and
MARY J. BOYLE, J.,CONCUR

APPENDIX C

STATUTES

TITLE 29. CRIMES --PROCEDURE
CHAPTER 2907. SEX OFFENSES
SEXUAL ASSAULTS

ORC § 2907.02 (2008)

29 ORC § 2907.02. Rape

(A) (1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the frst degree. If the offender under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in section 3719.41 of the Revised Code to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in section 2929.14 of the Revised Code that is not less than five years. Except as otherwise provided in this division, notwithstandig sections 2929.11 to 2929.14 of the Revised Code, an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code. If an offender is convicted of or pleads guilty to a violation of division (A)(1)(b) of this section, if the offender was less than sixteen years of age at the time the offender committed the violation of that division, and if the offender during or immediately after the commission of the offense did not cause serious physical harm to the victim, the victim was ten years of age or older at the time of the commission of the violation, and the offender has not previously been convicted of or pleaded guilty to a violation of this section or a substantially similar existing or former law of this state, another state, or the United States, the court shall not sentence the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, and instead the court shall sentence the offender as

otherwise provided in this division. If an offender under division (A)(1)(b) of this section previously has been convicted of or pleaded guilty to violating division (A)(l)(b) of this section or to violating an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of this section, if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, or if the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, the court may impose upon the offender a term of life without parole. If the court imposes a term of life without parole pursuant to this division, division (F) of section 2971.03 of the Revised Code applies, and the offender automatically is classified a tier III sex offender/child-victim offender, as described in that division.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not he admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

29 OCR § 2907.03. Sexual battery

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution.

(2) The offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired.

(3) The offender knows that the other person submits because the other person is unaware that the act is being committed.

(4) The offender knows that the other person submits because the other person mistakenly identifies the offender as the other person's spouse.

(5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person.

(6) The other person is in custody of law or a patient in a hospital or other institution, and the offender has supervisory or disciplmary authority over the other person.

(7) The offender is a teacher, administrator, coach, or other person in authority employed by or serving in a school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code, the other person is enrolled in or attends that school, and the offender is not enrolled in and does not attend that school.

(8) The other person is a minor, the offender is a teacher, administrator, coach, or other person in

authority employed by or serving in an institution of higher education, and the other person is enrolled in or attends that institution.

(9) The other person is a minor, and the offender is the other person's athletic or other type of coach, is the other person's instructor, is the leader of a scouting troop of which the other person is a member, or is a person with temporary or occasional disciplinary control over the other person.

(10) The offender is a mental health professional, the other person is a mental health client or patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes.

(11) The other person is confined in a detention facility, and the offender is an employee of that detention facility.

(12) The other person is a minor, the offender is a cleric, and the other person is a member of, or attends, the church or congregation served by the cleric.

(B) Whoever violates this section is guilty of sexual battery. Except as otherwise provided in this division, sexual battery is a felony of the third degree. If the other person is less than thirteen years of age, sexual battery is a felony of the second degree, and the court shall impose upon the offender a mandatory prison term equal to one of the prison terms prescribed in section 2929.14 of the Revised Code for a felony of the second degree.

(C) As used in this section:

(1) "Cleric" has the same meaning as in section 2317.02 of the Revised Code,

(2) "Detention facility" has the same meaning as in section 2921.01 of the Revised Code.

(3) "Institution of higher education" means a state institution of higher education defined in section 3345.011 [3345.01.1] of the Revised Code, a private nonprofit college or university located in this state that possesses a certificate of authorization issued by the Ohio board of regents pursuant to Chapter 1713. of the Revised Code, or a school certified under Chapter 3332. of the Revised Code.

29 ORC § 2907.06. Sexual imposition

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard.

(2) The offender knows that the other person's, or one of the other person's, ability to appraise the nature of or control the offender's or touching person's conduct is substantially impaired.

(3) The offender knows that the other person, or one of the other persons, submits because of being unaware of the sexual contact.

(4) The other person, or one of the other persons, is thirteen years of age or older but less than sixteen years of age, whether or not the offender knows the age of such person, and the offender is at least

eighteen years of age and four or more years older than such other person.

(5) The offender is a mental health professional, the other person or one of the other persons is a mental health client or patient of the offender, and the offender induces the other person who is the client or patient to submit by falsely representing to the other person who is the client or patient that the sexual contact is necessary for mental health treatment purposes.

(B) No person shall be convicted of a violation of this section solely upon the victim's testimony unsupported by other evidence.

(C) Whoever violates this section is guilty of sexual imposition, a misdemeanor of the third degree. If the offender previously has been convicted of a violation of this section or of section 2907.02, 2907.03, 2907.04, 2907.05, or 2907.12* of the Revised Code, a violation of this section is a misdemeanor of the fist degree.